

U.S. Department of Labor

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Date: February 26, 2001

Case No.: 2000-LHC-2225

OWCP No.: 5-108042

In the Matter of:

HIAWATHA L. BROWN,
Claimant,

v.

VIRGINIA INTERNATIONAL TERMINALS,
Employer.

Appearances:

Chanda L. Wilson, Esq.
For Claimant

R. John Barrett, Esq.
For Employer

Before: DANIEL A. SARNO, JR.
Administrative Law Judge

DECISION AND ORDER

This proceeding arises from a claim under the Longshore and Harbor Workers' Compensation Act ("the Act"), as amended, 33 U.S.C. §§ 901 *et seq.*

A formal hearing was held in this case on October 4, 2000, in Newport News, Virginia. Mr. Brown, (hereinafter, Claimant) offered exhibits CX 1 through CX 9 and Virginia International Terminals (hereinafter, Employer) offered exhibits EX 1 through EX 5. The exhibits were admitted into evidence without objection.¹ Both parties submitted post-hearing briefs. The findings and conclusions which follow are based on a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

STIPULATIONS

Employer and Claimant stipulated to, and the court finds, the following facts:

1. An Employer/Employee relationship existed at all relevant times;
2. Claimant filed a timely claim for compensation benefits;
3. Employer filed a timely First Report of Accident with the Department of Labor;
4. Employer filed a timely Notice of Controversion with the Department of Labor;
5. Claimant's average weekly wage is \$613.75 which yields a compensation rate of \$409.17;
6. The dates of Claimant's disability were January 5th, 7th, 10th through 17th, and 20th through 30th, 2000. TR 28.

ISSUES

1. Where Claimant's injury occurred on a public road outside of Employer's premises, did the injury occur on a covered situs as defined by §903(a) of the Act?
2. When Claimant's injury occurred while on his way back to work after his lunch break, did the injury arise out of and in the course of employment?

FINDINGS OF FACT

¹The following abbreviations will be used as citations to the record:

CX - Claimant's Exhibit

EX - Employer's Exhibit

TR - Transcript

1. Claimant is employed as a longshoreman by Employer. On January 4, 2000, he was assigned to work at the Portsmouth Marine Terminal (hereinafter, "PMT" or "terminal"), located adjacent to the Elizabeth River. TR 13.
2. Around 11:50 a.m. on January 4, 2000, while returning to the terminal from his lunch break, Claimant was involved in a motor vehicle accident. TR 12, 13. Claimant was entering Hill Street, where the main gate for PMT is located. TR 13. A port authority police car was located in front of Claimant. TR 13. Both cars were headed towards the gate. TR 13. The police car stopped, began to reverse in Claimant's direction, and backed into Claimant's vehicle. TR 13. Claimant was between 35 and 40 feet from the main gate when the accident occurred. TR 22.
3. As a result of the accident, Claimant suffered neck, shoulder and back injuries. TR 15. He sought medical treatment, consisting of x-rays and medication, at Mary View Hospital. TR 16. Claimant eventually sought the care of Dr. Slone, a chiropractor. TR 17.
4. On the day of the accident, Claimant was working in the sweeping gang, which is responsible for cleanup. TR 16. According to Claimant, the sweeping gang cleans the area along the fence on Hill Street. TR 19. He specified that they cleaned up Hill Street until they reached a restaurant called Doughtie's. TR 20.
5. Mr. Mark Wilder, the terminal manager for PMT, testified that the clean up crew cleans the grassy area outside of the terminal gate to ensure both sides of the gate and surrounding fences are clean. TR 36. Additionally, the crew cleans the parking lot near Doughties Restaurant, which is adjacent to the terminal facility. TR 34. Wilder stated that the terminal's cleanup crew is assigned to clean the area because the parking lot is used by longshoremen. TR 35. However, Wilder unequivocally stated that employees do not clean Hill Street itself. TR 37, 38.
6. The only way into the terminal is through the main gate, located on Hill Street. TR 21. Wilder testified that PMT owns the area north of the guard shack to the water, and that south of the guard shack to Wesley Street (Hill Street) is owned and maintained by the City of Portsmouth. TR 29.
7. Although the City of Portsmouth maintains Hill Street, PMT takes care of maintenance problems on the portion of Hill Street that is located inside the main gate. TR 30. This portion of Hill Street is owned by the Virginia Port Authority. TR 31.
8. In addition to the gate, Hill Street is separated from the terminal property by a fence. TR 31, 32.

9. Claimant testified that the general public does not use Hill Street, so anyone turning onto Hill Street would be going to the terminal. TR 21. However, Wilder noted that other facilities, including Universal Sea Land, Moon Engineering, and Crofton Diving use the main gate on Hill Street to reach their facilities. TR 39. Additionally, a public marina is located on the back side of the terminal, which is accessed by Hill Street. TR 40.

CONCLUSIONS OF LAW

In order to make a claim under the Act, a claimant must meet both the status and situs requirements of coverage. Specifically, the Act requires that the claimant be an “employee” as defined by the Act (status), and that the injury occur within a geographical area covered by the Act (situs). Section 2(3)² of the Act defines status while Section 3(a)³ defines situs.

In this case, the injury occurred on a public road located outside the marine terminal. TR 13, 30. Therefore, the injury did not occur over the navigable waters of the United States. As a result, the court must decide whether the injury occurred on “any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or *other adjoining area* customarily used by any employer in loading, unloading, repairing, dismantling, or building a vessel.” 33 U.S.C. § 903(a) (emphasis added).

The Fourth Circuit interpreted “other adjoining area” in *Sidwell v. Express Container Servs.*, 29 BRBS 138 (CRT) (4th Cir. 1995). In that case, the employee was injured while working at a facility eight-tenths of a mile from the employer’s shoreside terminal. *Id.* at 139. The facility was:

surrounded by businesses and residential developments, including a sheet metal shop, a paint contractor, a row of houses, an engraving shop, a heating and air-conditioning contractor, a gas station, a fire station, a container yard, a Nissan-owned storage area, a foundry, a wholesale meat distributor, a painting and sandblasting contractor, a railroad yard, and a large residential area across the highway.

²“The term employee means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker” 33 U.S.C. § 902(3). Section 2(3) also lists exceptions to this definition, none of which are at issue in this case.

³ “Except as otherwise provided in this section, compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).” 33 U.S.C. § 903(a).

Id. In holding that these facts precluded a finding of situs, the Fourth Circuit stated that an area “adjoins” navigable waters only if it is “‘contiguous with’ or otherwise ‘touches’ such waters.” *Id.* at 143. “If there are other areas between the navigable waters and the area in question, the latter area simply is not ‘adjoining’ the waters under any reasonable definition of that term.” *Id.* An “area” is a “discrete structure or facility, the very *raison d’etre* of which is its use in connection with navigable waters.” *Id.* Furthermore, “it is inescapable that some notion of property lines will be at least relevant, if not dispositive, in determining whether the injury occurred within a single ‘other adjoining area.’” *Id.* Finally, the *Sidwell* Court added that “it is the parcel of land that must adjoin navigable waters, not the particular square foot on that parcel upon which a claimant is injured.” *Id.* at n.11. In *Parker v. Director, OWCP*, 30 BRBS 10, 12 (CRT) (4th Cir. 1996), the Fourth Circuit elaborated on this notion and expressly stated that situs exists “if the injury occurs within the boundaries of a marine terminal that is contiguous with navigable waters.”

The Benefits Review Board (the “Board”) applied *Sidwell* when it denied situs in *Kerby v. Southeastern Pub. Serv. Auth.*, 31 BRBS 6 (1997). In *Kerby*, a power plant built to serve the naval shipyard, and sitting on land owned by the Navy, was separated from the shipyard by a “private railroad spur” and “chain link fence.” *Id.* at 10. Additionally, personnel from the power plant could not move freely to the terminal without a pass. *Id.* at 11. The Board held that these circumstances showed that there was a “clear separation of the two parcels of land.” *Id.* at 10.

In two other recent cases, the Board focused on the separation of parcels of land by public streets and fences. In *Griffin v. Newport News Shipbuilding and Dry Dock Co.*, 32 BRBS 87, 89 (1998), the Board held that because the parking lot in question “is physically separated from employer’s shipyard by a public street as well as a security fence, it must be deemed to be a separate and distinct piece of property rather than part of the overall shipyard facility.” Similarly, in *McCormick v. Newport News Shipbuilding and Dry Dock Co.*, 32 BRBS 207, 209 (1998), the claimant was injured at a site separated from the shipyard by public roads and security fences. The Board quoted *Griffin* and held that “since Building 511 is a separate and distinct parcel of land, it cannot be considered an ‘adjoining area’ under Section 3(a).” *Id.*

Applying the Board’s interpretations of *Kerby*, *Griffin*, and *McCormick* to the case at hand, Claimant’s injury did not occur on an “adjoining area” as required by the Act. The public portion of Hill Street where Claimant’s accident occurred is clearly not part of the land owned by the terminal; rather, it is a public road owned and maintained by the City of Portsmouth. TR 29. The road provides access to at least four other facilities, one of which is a public marina. TR 39-40. It is clearly separated from the terminal by a main gate. TR 13, 21. There is also a fence that separates the terminal property from the public portion of Hill Street. TR 31, 32. The section of Hill Street where Claimant’s accident occurred was between 35 and 40 feet away from the main gate of the terminal, by its very definition outside of the terminal property. TR 22. It is simply not reasonable that the portion of Hill Street located outside of the main gate be considered part of the terminal facility. Therefore, Claimant’s accident could not have reasonably occurred on an “adjoining area” as required by the Act.

Because the public portion of Hill Street is not a covered situs, Claimant's injury does not meet the situs requirement of the Act.

ORDER

Accordingly, it is hereby ORDERED that:

Claimant's request for compensation and medical benefits under the Act is DENIED.

DANIEL A. SARNO, JR.
Administrative Law Judge

DAS/AMM